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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. GUY SULLIVAN WILSON, Defendant and Appellant.	B208638 (Los Angeles County Super. Ct. No. BA245377)

APPEAL from a judgment of the Superior Court of Los Angeles County, Lance A. Ito, Judge. Modified and, as so modified, affirmed.

Susan K. Keiser, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan Sullivan Pithey and Taylor Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Guy Sullivan Wilson appeals from the judgment entered following a jury trial that resulted in his convictions for pimping, pandering, and conspiracy. He was sentenced to a prison term of four years. Wilson contends: (1) the evidence was insufficient to support his convictions; (2) the trial court erred by improperly excluding testimony; (3) sentence on counts 7, 8, 9, 10, 13, and 14 must be stayed pursuant to Penal Code section 654;[1] (4) his sentence constitutes cruel and unusual punishment; and (5) his counsel provided ineffective assistance. Wilson also requests that this court review the sealed transcript of the trial court's in camera review of police personnel records (*People v. Mooc* (2001) 26 Cal.4th 1216). We conclude that sentence on the conspiracy count must be stayed pursuant to section 654, and order the judgment modified accordingly. In all other respects, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts.*

a. *People's evidence.*

In the fall of 2003, the Los Angeles County Sheriff's Department conducted an undercover operation to determine whether an Inglewood massage parlor known as "Oriental Acupressure" was a front for a house of prostitution.

(i) *Events of September 4, 2003.*

As part of that undercover operation, on the evening of September 4, 2003, Los Angeles County Sheriff's Deputy John Khounthavong, who was wired with a transmitter, visited Oriental Acupressure. A team of officers waited nearby, concealed in a parked van. Wilson, who had worked at the establishment since approximately 1996, greeted Khounthavong, indicated he should follow him through the establishment's interior doors, and asked, " 'How long.' " Khounthavong responded, " '30 minutes,' " and gave Wilson $50 in cash. Wilson escorted Khounthavong to a room and left. Khounthavong undressed. After several minutes, a young Asian woman who gave her name as "Sasha"

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[1] All further undesignated statutory references are to the Penal Code.

entered the room, clad in a bikini. Sasha gave Khounthavong a 10-minute massage and then whispered in his ear, " 'what do you want?' " Khounthavong responded, " 'everything,' " indicating he wanted a massage and sex. Sasha left the room, returned with a wet towel, and removed her bikini. Khounthavong said, " 'Disneyland,' " a prearranged signal to monitoring deputies indicating solicitation had occurred. Khounthavong's utterance startled Sasha, who asked if he was a police officer, grabbed her bikini, and ran from the room.

Sasha went to the kitchen area, which doubled as an office, and spoke to Wilson. A transcript of their conversation, which was recorded by Oriental Acupressure's video recording system, was played for the jury, as follows:

"Sasha: . . . in P-1. Is he a regular customer?

"Wilson: P-1?

"Sasha: [Unknown]

"Wilson: Yeah, he normally comes in here on Sundays and sees Anna. Anna, you know who Anna is.

"Sasha: I know Anna, but you not sure, right?

"Wilson: Not a hundred percent. I mean, usually if you name off names I'm still not a hundred percent sure.

"Sasha: Just see Anna?

"Wilson: He talked of Anna and that he looks familiar. At that point there, I mean, do what you feel comfortable with.

"Sasha: Oh, because . . . he say, I wanna go Disneyland sometimes . . . you know. Disneyland. Some under cops say that, too. Why did he say Disneyland right now?

"Wilson: Bora, I have no idea.

"Sasha: He say, 'you wanna pay now or later,' after I say no. He say, 'today I went to Disneyland . . . .' "

Sasha returned to the massage room and again asked Khounthavong if he was a police officer. He denied it, and said he was leaving because she scared him. Sasha offered to finish his massage and told him that if he was not comfortable with her, she

could " 'offer [him] a different woman or different girl.' " Khounthavong declined the offer and left Sasha a $40 tip to ease her suspicions. After Khounthavong left, Sasha again spoke to Wilson about her concerns.[2]

(ii) *September 11, 2003 search of Oriental Acupressure.*

On September 11, 2003, Detective Brian Schlosser and 15 other law enforcement personnel executed a search warrant at Oriental Acupressure. Schlosser observed that in each room, the massage table was placed up against the wall. There were condoms in several lockers. The establishment's alarm system was set to the Inglewood Police Department's radio frequency. The security guard had the ability to activate a warning light in each massage room.

Also on September 11, 2003, officers executed a search warrant at the Ranchos Palos Verdes home of the owners of Oriental Acupressure, Sunhi Lee and Wilford Johnson. The search disclosed, inter alia, videotapes taken from Oriental Acupressure's surveillance system, four large boxes filled with over $2 million in cash, and ledger sheets from the business.

(iii) *Events of October 1, 2003.*

Again acting in an undercover capacity, Detective Khounthavong returned to Oriental Acupressure on October 1, 2003. He was greeted by a security guard who took his cellular telephone. Wilson then greeted Khounthavong, collected $50 from him, and took him to a room in the back. A woman who identified herself as "Tami" entered the room, wearing a "really short" dress or blouse. As she massaged Khounthavong's back and the front of his body, she began giggling and hugged him. She left the room,

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[2] Their conversation was as follows: "Wilson: Gabby, gabby, gabby, gabby. [¶] Sasha: You know why I'm scared and gabby, gabby. [¶] Wilson: (to [another person])[.] She's talking that when they get scared . . . I'm scared. [¶] Sasha: He know only Anna why you . . . . [¶] Wilson: I said Anna but he also looks familiar. [¶] Sasha: Only one person . . . . [¶] Wilson: Because I've also seen him before and I'm relatively sure. [¶] Sasha: How many times you see him? [¶] Wilson: [Unknown] [¶] Sasha: You don't know, right? Sometimes you may give . . . regular customer."

returned with a wet towel, and removed her clothing. Khounthavong gave the "Disneyland" signal to the monitoring deputies. He then heard a commotion outside the room and observed the lights flicker. Tami jumped up and dressed herself quickly.

After officers received Khounthavong's signal, Schlosser executed a second search warrant at Oriental Acupressure. Schlosser discovered that a closet in the business led to an attic hiding place, from which several young women emerged while officers were executing the warrant. Videotape taken during the minutes just prior to the officers' entry showed that as the light system had flashed, the women had hurried to the closet and into the attic.

iv. *Testimony of former employees and customers.*

Tami Vanover, who had entered into a favorable plea agreement, had worked for Oriental Acupressure as a prostitute for seven years in the late 1990's.[3] The prostitutes received 40 percent of the money paid by the customers, and were allowed to keep their tips. Wilson began working at the business as a security guard in approximately 1996 and eventually became a manager. In that capacity he was responsible for sending the women, including Vanover, into the massage rooms to have sex with clients. Wilson warned Vanover to be cautious when dealing with new clients because they could be police officers. He instructed her to dress quickly and exit the room if a light in the room flashed. Wilson frequently discussed with Vanover and the other prostitutes the sexual activities occurring between the prostitutes and their clients. Daily ledgers memorialized transactions in the business, including the name of the prostitute providing services, the amount of time spent with the client, the room assignments, amounts paid by customers, the client's status as a new or regular customer, and clients' requests for service by particular women.

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3 Vanover resumed her employment with Oriental Acupressure in 2003, purportedly to evangelize the prostitutes. During this period, she was responsible for sending the women into the rooms with the clients.

Martin Parinello worked at Oriental Acupressure as a security guard in 2003. He took orders solely from Wilson, who instructed him to push a remote control button that activated a light in each massage room if police came to the door. On two occasions when police arrived, Parinello did so. Wilson also instructed Parinello to take customers' cellular telephones before they entered the business, if the phones were equipped with cameras.

Robert Butz was a former client of Oriental Acupressure. He began using the establishment's services in approximately 1996. During his first visit, a woman asked how much time he wished to purchase. Butz gave her $50 in cash. The woman led him into a massage room, where he showered and laid on the massage table. Another woman entered the room. Butz placed a $100 bill on the table, and he and the second woman engaged in sexual intercourse. Over the years, Butz used the services of Oriental Acupressure approximately 30 times, and each visit was similar to the first. On one or two occasions, he encountered Wilson at the business.

Jaime Brass began patronizing Oriental Acupressure in 1990, and used the establishment's prostitution services once a week until the business closed in 2003. The women wore a variety of outfits of their own choosing, not uniforms. Brass was never given a receipt for services rendered, nor did he fill out any paperwork. The rooms were equipped with massage beds and most had showers within the room. Brass observed Wilson working at Oriental Acupressure for years. On numerous occasions, Wilson escorted Brass to the massage rooms and took Brass's payment. Once, Wilson accidentally walked into the room while Brass was engaged in sexual intercourse with one of the prostitutes. Wilson closed the door and quickly left. When asked, "[w]as the aspect of sex something that was discreet in the business or not," Brass responded, "No." In the kitchen area, where Brass sometimes waited for services, the prostitutes discussed sexual matters among themselves, and Wilson made sarcastic, joking remarks of a sexual nature. However, Brass never directly discussed with Wilson the nature of the services he would receive.

Gary Wood used Oriental Acupressure's services for over 10 years, often visiting once or twice a week. When he arrived, he was asked how long he wished to stay and, sometimes, which woman he wished to see. Wood would then pay cash for services prior to being escorted to a room. Wilson collected Wood's money and escorted him to his room on over half of his visits. There were approximately seven or eight massage rooms in the establishment. The women generally wore short dresses. Police raided the establishment when Wood was present in 2003. A light above the door began flashing and there was "a lot of noise," including the sound of people running.

v. *Other evidence.*

Bank records indicated Wilson had received paychecks from Oriental Acupressure during the two-year period for which documents were obtained. No patient or client files were found at the business.

Videotapes taken from Oriental Acupressure's surveillance system showed various conversations between Wilson and the prostitutes and clients. In a conversation transpiring on August 29, 2003, Wilson expressed concern that a potential client might be an undercover officer, and explained that Oriental Acupressure did not display employees for clients with whom Wilson was not familiar.[4] In a conversation occurring on September 1, 2003, Wilson reassured customer Jean Claude that Oriental Acupressure's security guard was not a police officer and it was "safe" to come inside. Wilson also offered Jean Claude the services of one of the women, and discussed with employee

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[4] Wilson told employee "Erica" that he had become angry with employees "Maria" and "Lily" because they had opened the back door for a customer, rather than making him go around to the lobby. Wilson explained: "I'm sorry, you know, it's like, I don't know, this guy. He doesn't know anybody when I brought him in. Okay? I go, who have you seen? (I don't even know anybody's name. Well can I see everybody?) No. We don't do that here. (Well the other ladies let me do it.) [¶] I said, but you don't know anybody's name. You don't know anybody, but yet you want me to show you people. I don't know who you are. I don't know who you know and, at the same time, you know, you could be an undercover police officer you can be anything."

"Laura" that a customer had opened the door while she was engaged in sexual activity with another client.[5] During another conversation on September 1, 2003, Wilson, Laura, and another employee discussed that Laura did not wish to engage in sexual relations with a client because he had talked to her regarding pricing.[6] Later that evening, Wilson stated that Laura was currently engaging in sexual relations with a client.[7] In a video excerpt recorded on September 2, 2003, Wilson was shown talking to himself, stating, "Twenty minutes?" Employee " Sasha" then entered the room and Wilson asked, "you fucked him in twenty minutes?"

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[5] The conversation was as follows: "Laura: Who was in P-3 room? Some asshole came and opened all the doors. I said, get out of here you fucking idiot and he looked at me. And he opened the door and stand there for, like, two minutes while I'm in the middle of you know what. [Unknown]. Hi, Jean. [¶] Friend: The guy opened doors? [¶] Laura: Yes. Idiot. [¶] Jean Claude: He's gone now? [¶] Wilson: Oh, he's gone. I know which guy it was. I threw him out. [¶] . . . I have this charming young lady now available. She likes [unknown] very much. [¶] Jean Claude: The White lady? [¶] Wilson: Yes. [¶] Jean Claude: Is she a good masseuse? [¶] Wilson: Very good. Very recommended. [¶] Jean Claude: Okay, I'll take her from you. [¶] Wilson: Very good. I have two girls coming out in a few minutes. If you want why don't we wait in there . . . ."

[6] The conversation was as follows: "Molina: This guy, Laura just doesn't want to fuck him. . . . [S]he was yelling at me. [¶] Wilson: Who. [¶] Molina: [Unknown]. [¶] Laura: (back in office)[.] How much, how much, how much full service. Of course I'm going to say no. Idiot." After Laura discussed with an individual denominated "friend" that a client should never "talk to girl how much" because "Girls get scared," Wilson asked Laura, "What happened?" Laura replied, "He talk too much." Wilson asked whether the customer wanted his money back.

[7] "Wilson: Can you [hear] that? [unknown] in there fucking Laura he says, Laura, you look like you've lost weight, Laura. (Molina laughs) I'm going to tell her that. [¶] Molina: [Unknown] [¶] Wilson: No, because he's in fucking Laura right now, claiming that she's fat-- [¶] Molina: What? What? What? [¶] Wilson: He said she has a big ass."

b. *Defense evidence.*

Wilson's older sister, Diane Wilson,[8] testified that she had visited Wilson at Oriental Acupressure and believed it was a legitimate massage business. Wilson tended to joke about sexual matters.[9]

Wilson testified in his own behalf, as follows. Starting in 1996, he was employed by a security company that assigned him to Oriental Acupressure. Approximately 10 months later, he became employed by Oriental Acupressure as a cashier. In that capacity, his duties were to greet the clients, put them in the massage rooms, and collect their money. His normal working hours were 8:00 a.m. to 5:00 p.m. He was paid only $10 per hour. He was not involved in personnel matters, training, banking, or payroll, and was never promoted to manager.

He was unaware Oriental Acupressure was a front for prostitution, and he would not have remained employed there had he known otherwise. A variety of circumstances suggested to him that the business was legitimate. He observed massage therapist certificates on the office wall, indicating the employees were legitimate masseuses. During his tenure with the company, the business passed fire and business license inspections. Law enforcement officers were customers of Oriental Acupressure, and had even inquired whether they were entitled to a law enforcement discount. On one occasion, Wilson learned that a massage technician was engaging in prostitution, and her employment was immediately terminated after he reported her activities to one of the owners. He had turned away potential clients who asked about sexual services. The establishment had female, as well as male, customers. Moreover, none of the massage technicians ever informed him that she was engaging in prostitution. The massage technicians spoke primarily in Korean, a language Wilson did not understand. He

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8 For ease of reference, we hereinafter sometimes refer to Diane Wilson by her first name.

9 Diane's testimony is discussed in more detail *post.*

sometimes joked with them about sexual matters because "[t]hat was just [his] personality." The technicians' attire did not raise his suspicions, as he observed the same style of dress "out on the street every day." He denied discovering Brass and a masseuse engaged in sexual relations. Showers were provided because some clients wished to remove massage oil from their persons. The security system was installed because robberies had occurred nearby. The business kept track of whether patrons were repeat or new customers because the owner wished to track such information. Wilson's videotaped comments had been taken out of context or misunderstood. For example, in regard to the conversation in which he purportedly queried, " 'You fucked him in 20 minutes,' " he actually stated, " 'You fucked him *out of* 20 minutes,' " because the masseuse had not completed the entire massage time. (Italics added.) During the other conversations, he had simply been "joking around." Wilson admitted that customers never inquired about different massage techniques, such as shiatsu; the business did not require customers to fill out personal information or medical forms; the women employees used aliases; the business did not keep an appointment book, and sometimes stayed open past midnight; there was no cash register on the premises; and receipts were typically not issued for services.

2. *Procedure.*

Trial was by jury. Wilson was convicted of three counts of pimping (§ 266h, subd. (a)), three counts of pandering (§ 266i, subd. (a)(1)), and conspiracy to commit pimping and pandering (§ 182, subd. (a)(1)). The trial court sentenced Wilson to a prison term of four years. It imposed a restitution fine, a stayed parole restitution fine, and a court security assessment. Wilson appeals.

DISCUSSION

1. *The evidence was sufficient to support Wilson's convictions.*

Wilson contends that his convictions must be reversed for insufficiency of the evidence. We disagree.

When determining whether the evidence was sufficient to sustain a criminal conviction, "we review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence--that is, evidence that is reasonable, credible and of solid value--from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]" (*People v. Snow* (2003) 30 Cal.4th 43, 66; *People v. Halvorsen* (2007) 42 Cal.4th 379, 419.) We presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. (*People v. Medina* (2009) 46 Cal.4th 913, 919.) Reversal is not warranted unless it appears " 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331; *People v. Zamudio* (2008) 43 Cal.4th 327, 357.) The same standard governs in cases where the prosecution relies primarily on circumstantial evidence. (*People v. Zamudio, supra,* at p. 357; *People v. Maury* (2003) 30 Cal.4th 342, 396.) The testimony of a single witness, unless physically impossible or inherently improbable, is sufficient to support a conviction. (Evid. Code, § 411; *People v. Young* (2005) 34 Cal.4th 1149, 1181.)

a. *Pimping.*

Section 266h, subdivision (a), provides that "any person who, knowing another person is a prostitute, lives or derives support or maintenance in whole or in part from the earnings or proceeds of the person's prostitution, or from money loaned or advanced to or charged against that person by any keeper or manager or inmate of a house or other place where prostitution is practiced or allowed, or who solicits or receives compensation for soliciting for the person, is guilty of pimping, a felony, . . ." Thus, "section 266h can be violated in either of two basic ways: (1) by *deriving support* from the earnings of another's act of prostitution or (2) by *soliciting*." (*People v. McNulty* (1988) 202

Cal.App.3d 624, 630.) "In regard to the first basic way to violate the statute, deriving support with knowledge that the other person is a prostitute is all that is required[.]" (*Ibid.*)

The evidence Oriental Acupressure was nothing more than a house of prostitution was overwhelming. Among other things, three clients testified to their long-term usage of sexual services at the location. Detective Khounthavong was offered sexual services on September 4 and October 1, 2003 when he posed as a customer. Vanover testified that she had worked as a prostitute at the business and that the employees were still providing sexual services in 2003. Indeed, Wilson concedes the point, acknowledging that there was uncontradicted evidence prostitution was ongoing at Oriental Acupressure.

There was likewise ample evidence Wilson solicited. Wilson's duties at Oriental Acupressure consisted of scheduling trysts for the prostitutes, escorting customers into the rooms, taking customers' money, and directing the women into the rooms where they would perform sexual services for the clients. By these activities, Wilson clearly solicited. (See *People v. Navarro* (1922) 60 Cal.App. 180, 182 [where appellant "stood at the door of [a prostitute's] room and demanded and received the money from the men who entered without handing any of it over to her[,]" there was ample evidence to support his conviction for pimping].) There was undisputed evidence Wilson derived support and maintenance from the prostitutes' earnings. Oriental Acupressure's considerable income was derived from the prostitutes' earnings, and Wilson was paid a salary by Oriental Acupressure for his performance of the aforementioned duties.

Wilson's insufficiency argument focuses primarily on his purported lack of knowledge that prostitution was occurring at Oriental Acupressure. He posits that the only direct evidence of knowledge was Vanover's testimony that she told him prostitution occurred at the business between 1998 and 2000. This testimony, he argues, failed to establish he knew prostitution was occurring years later, in 2003. In his view, the People's case amounted to "pure speculation unsupported by substantial evidence."

Wilson's argument is not persuasive. There was overwhelming evidence Wilson knew Oriental Acupressure's employees were prostitutes who were, in 2003 as well as

during the preceding years, providing prostitution services to customers. Wilson worked at the business for at least seven years. During his tenure, and in his presence, it was commonplace for the prostitutes to discuss their sexual activities with clients. Vanover personally told Wilson of her prostitution activities at the business in the late 1990's. One of the establishment's former customers, Brass, testified that Wilson had walked in the room when he and a prostitute were having sexual relations. Wilson's knowledge of the nature of the business during the years prior to 2003 was highly probative on the question of his knowledge in 2003. There was no evidence suggesting the character of the business had changed over the years, and no evidence Wilson had reason to so believe. Moreover, the seized videotapes showed Wilson was well aware of the nature of the business in the fall of 2003. In one conversation, Wilson stated that a prostitute was having intercourse with a client in one of the establishment's rooms. In another conversation, Wilson recommended and offered one of the prostitutes to a client. In yet another conversation Wilson queried whether one of the prostitutes had had intercourse with a client "in twenty minutes."

Further, the evidence demonstrated Wilson's concern to keep police officers from discovering the nature of the business, from which the jury could reasonably infer his knowledge. Wilson instructed a security guard in 2003 to activate the warning light system if police arrived. In several videotaped conversations, Wilson and the prostitutes discussed whether clients might be undercover officers or whether they were "regulars," demonstrating concern to keep the business's activities from police. Had Oriental Acupressure provided legitimate massage services, there would have been no reason for such secrecy.

Moreover, numerous aspects of Oriental Acupressure's methods of doing business would have alerted any reasonable person that the establishment was actually a house of prostitution. Detective Schlosser testified that in a legitimate massage business, clients typically complete medical screening and personal information forms. The massage tables are positioned in the center of the room so the massage technicians can reach both sides of a patient's body. Both male and female massage technicians treat male and

female clients. The massage technicians are clad in professional attire. Therapists concentrate their efforts on particular areas troubling the patient, i.e., as Schlosser explained, "If . . . my shoulder was hurting, they would work on my shoulder." In contrast, the employees at Oriental Acupressure dressed in sexually provocative clothing. All the clients were male, and all the "massage technicians" were female. The massage tables appeared more like beds than typical massage tables, and were placed against the walls. Customers filled out no paperwork. Customers indicated how much time they wanted with the employee, but did not inform Wilson of any particular medical problem or request a particular massage technique. Customers paid primarily with cash; no medical insurance was used. In short, the business bore the obvious hallmarks of a house of prostitution, rather than a legitimate massage business.

Wilson points to a variety of evidence that he contends demonstrates his lack of knowledge, including that massage technician certifications were affixed to the wall; the former clients of the establishment testified they never discussed sexual services with him; he never provided condoms to any customer; the doors of the "treatment rooms" were closed while the women performed their services, and he did not observe any sexual activity transpire; and his lack of concern about Khounthavong's "Disneyland" signal demonstrated his unawareness that prostitution was occurring. These arguments, however, amount to nothing more than a request that we reweigh the evidence on appeal. This is not the function of an appellate court. "In deciding the sufficiency of the evidence, a reviewing court resolves neither credibility issues nor evidentiary conflicts. [Citation.] Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact." (*People v. Young, supra,* 34 Cal.4th at p. 1181.) "Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.]" (*People v. Maury, supra,* 30 Cal.4th at p. 403.) The evidence was sufficient.

b. *Pandering.*

Wilson also contends there was no substantial evidence showing he pandered, requiring reversal of counts 10, 13, and 14. Again, we disagree.

As relevant here, section 266i, subdivision (a) provides: "Except as provided in subdivision (b), any person who does any of the following is guilty of pandering, a felony, and shall be punishable by imprisonment in the state prison for three, four, or six years: [¶] (1) Procures another person for the purpose of prostitution." Section 266i's remaining subdivisions, roughly paraphrased, criminalize a variety of other types of pandering, including persuading or encouraging another to become a prostitute; finding another a place in a house of prostitution; causing, by various means, another to remain as an inmate in a house of prostitution; and receiving or giving money for procuring another for purposes of prostitution.[10] "Pandering, as defined in section 266i, includes a broad spectrum of behaviors and degrees of culpability." (*People v. Almodovar* (1987) 190 Cal.App.3d 732, 740-741.) The statute is an attempt " ' "to cover all the various ramifications of the social evil of pandering and include them all in the definition of the crime, with a view of effectively combating the evil sought to be condemned." ' [Citation.] It is 'designed to discourage prostitution by discouraging persons other than

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10 Section 266i, subdivision (a)(2) through (6) provides, in relevant part, that a person panders: "(2) By promises, threats, violence, or by any device or scheme, causes, induces, persuades or encourages another person to become a prostitute. [¶] (3) Procures for another person a place as an inmate in a house of prostitution or as an inmate of any place in which prostitution is encouraged or allowed within this state. [¶] (4) By promises, threats, violence or by any device or scheme, causes, induces, persuades or encourages an inmate of a house of prostitution, or any other place in which prostitution is encouraged or allowed, to remain therein as an inmate. [¶] (5) By fraud or artifice, or by duress of person or goods, or by abuse of any position of confidence or authority, procures another person for the purpose of prostitution, or to enter any place in which prostitution is encouraged or allowed within this state, or to come into this state or leave this state for the purpose of prostitution. [¶] (6) Receives or gives, or agrees to receive or give, any money or thing of value for procuring, or attempting to procure, another person for the purpose of prostitution, or to come into this state or leave this state for the purpose of prostitution."

the prostitute from augmenting and expanding a prostitute's operation, or increasing the supply of available prostitutes.' [Citation.]" (*Id.* at p. 741; *People v. Patton* (1976) 63 Cal.App.3d 211, 217; *People v. Hashimoto* (1976) 54 Cal.App.3d 862, 867.)

Here, Wilson was charged with, and convicted of, violating section 266i, subdivision (a)(1), i.e., pandering by procuring. The evidence showed Wilson scheduled appointments for the prostitutes with customers; took the customers' money when they arrived; showed the customers to the rooms; and sent the prostitutes into the rooms after the customers were inside. These activities amounted to procuring another person for the purposes of prostitution. "Procure" is defined as, inter alia, "to get and make available for promiscuous sexual intercourse," (Merriam Webster's 10th Collegiate Dict. (1993) p. 930); "To obtain, as a prostitute, for another"; and "To bring the seller and the buyer together so that the seller has an opportunity to sell." (Black's Law Dict. (5th ed. 1979) p. 1087, col. 2.) Wilson's function at Oriental Acupressure was precisely that: he scheduled appointments and led the customers and the women to the rooms, essentially bringing together the buyers and sellers of sexual services. By these activities, he obtained prostitutes for the customers. (See generally *People v. Osuna* (1967) 251 Cal.App.2d 528, 533 ["The essence of the crime of pandering here was the placing of a female person in a place . . . in which prostitution was encouraged"].)

People v. Wagner (2009) 170 Cal.App.4th 499, cited by Wilson, does not assist him. In *Wagner,* the defendant, a pimp, approached a streetwalker who had been working as a prostitute for two years and asked that she come work for him. He was charged with pandering pursuant to section 266i, subdivision (a)(2). (*Wagner*, at p. 502.) Subdivision (a)(2) criminalizes causing, inducing, persuading, or encouraging another person to become a prostitute by means of promises, threats, violence, or any other device or scheme. At the People's request, the *Wagner* trial court modified the standard jury instruction to specify that pandering includes the situation where a defendant encourages or solicits a known prostitute to change her business relationship, i.e., come work for him, rather than continue to ply her trade without a pimp. (*Wagner*, at p. 502.) On appeal, *Wagner* concluded the instructional modification was error. The plain

language of subdivision (a)(2) prohibits inducing one to *become* a prostitute, not simply change her business relationship. Thus, the modified instruction impermissibly expanded the scope of the pandering crime for which Wagner was convicted. (*Wagner*, at p. 502.)

Wilson argues that *Wagner* compels reversal of his convictions because, as in that case, the women working at Oriental Acupressure were already prostitutes; he did nothing to cause them to become prostitutes in the first instance. The People, on the other hand, suggest that *Wagner* was incorrectly decided.[11] In our view, *Wagner* has limited application to this case because Wilson was charged with, and convicted of, violation of section 266i, subdivision (a)(1), not subdivision (a)(2), which was at issue in *Wagner*. As set forth *ante*, subdivision (a)(1) applies when the defendant "[p]rocures another person for the purpose of prostitution." Unlike subdivision (a)(2), it does not require that the defendant persuade or encourage another person "to become a prostitute." (§ 266i, subd. (a)(2).) Section 266i's various subdivisions "do not state different offenses but merely define the different circumstances under which the crime of pandering may be committed. 'The commission of any one of the acts described . . . constitutes the offense of pandering . . . ." (*People v. Lax* (1971) 20 Cal.App.3d 481, 486.) Thus, whatever the merits of the *Wagner* case, there was no requirement that Wilson encourage or persuade another to become a prostitute; it was enough that he procured another person for the purposes of prostitution.

In sum, the evidence was sufficient to prove pimping and pandering in violation of sections 266h and 266i, as well as conspiracy to commit these crimes.[12] (See generally

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[11] *People v. Cason* (2009) 179 Cal.App.4th 1419, review granted March 18, 2010, S179344, disagreed with *Wagner*'s analysis. The issue is currently before our Supreme Court. (*People v. Cason*, *supra*, S179344; *People v. Zambia* (2009) 173 Cal.App.4th 1221, review granted August 19, 2009, S173490.)

[12] Wilson's argument that the conspiracy count was unsupported by substantial evidence is based entirely upon his contention that the evidence was insufficient to show the substantive crimes.

§§ 182, subd. (a)(1), 184; *People v. Morante* (1999) 20 Cal.4th 403, 416-417; *People v. Swain* (1996) 12 Cal.4th 593, 599-600.)

2. *The trial court did not prejudicially err by excluding testimony on hearsay grounds.*

a. *Additional facts.*

Prior to commencement of the defense case, the People requested that the trial court conduct an Evidence Code section 402 hearing into the relevance of the proposed testimony of Wilson's sister, Diane Wilson, whom the defense intended to call as a witness. The trial court heard defense counsel's offer of proof and Diane's proposed testimony. Among other things, she intended to testify that she had overheard Wilson making appointments at Oriental Acupressure and talking with the employees and customers, but had never heard him discuss sexual services. The trial court ruled her testimony was admissible, with the exception of testimony regarding "telephone calls [where] she hears stuff in the background." The court concluded such testimony would constitute double hearsay and would lack foundation.

Diane then testified consistently with her Evidence Code section 402 hearing testimony, as follows. She spoke to Wilson on a daily basis and babysat his son. Wilson joked a lot about sexual matters, and had done so since high school. Diane had visited Oriental Acupressure numerous times during the years Wilson was employed there, sometimes as often as several times a month. She entered the building during approximately half her visits, but never entered the kitchen area or the treatment rooms. She had used the Oriental Acupressure restroom approximately 30 times, but had never observed condoms or any other items related to sexual activity therein. The massage technicians at Oriental Acupressure wore a variety of styles of clothing, similar to the attire worn by technicians at another legitimate massage establishment Diane had visited. Diane did not view the technicians' attire as any more "sexually enticing" than the short skirts she routinely observed in her own corporate workplace. Her observations of Oriental Acupressure had led her to conclude the business was a legitimate, run-of-the-mill massage business. When defense counsel queried whether Diane had ever heard

Wilson discussing sexual matters with customers or employees, the trial court sustained the People's hearsay objections.

b. *Discussion.*

Wilson contends that the trial court's ruling was error. He posits that the questions posed by his counsel did not call for hearsay responses. Instead, he argues, testimony that Diane did not hear Wilson talking about sex with customers or employees was not offered for its truth, but only to demonstrate the statements were not made. (See *People v. Lo Cicero* (1969) 71 Cal.2d 1186, 1190; Evid. Code, § 1200 [hearsay is evidence of an out-of-court statement offered to prove the truth of the matter stated].) Wilson contends that erroneous exclusion of the proposed testimony "went to the heart of [his] defense" that he was unaware prostitution was occurring at Oriental Acupressure, and violated his rights to due process, to confront witnesses, and to present evidence. (*Holmes v. South Carolina* (2006) 547 U.S. 319, 324-326.) The People, on the other hand, argue the evidence was properly excluded as hearsay.

We need not determine whether the proffered testimony was properly excluded, however, because any error was harmless. The erroneous exclusion of evidence requires reversal only if it is reasonably probable that appellant would have obtained a more favorable result had the evidence been allowed. (Evid. Code, § 354; *People v. Richardson* (2008) 43 Cal.4th 959, 1001; *People v. Earp* (1999) 20 Cal.4th 826, 880.) Here, exclusion of the evidence was harmless under any standard (*Chapman v. California* (1967) 386 U.S. 18; *People v. Watson* (1956) 46 Cal.2d 818.)[13] The majority of Diane's testimony was allowed, including that she never observed anything at Oriental Acupressure that led her to suspect it was a front for prostitution. The excluded testimony--i.e., that she never heard Wilson discussing sexual matters with employees or

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[13] The People argue that Wilson has waived his claim because he failed to adequately explain the nonhearsay basis of the proffered testimony below. Given our conclusion that the purported error was harmless under any standard, we need not reach the People's argument.

clients--would have been only marginally helpful to the defense. Diane was not employed by Oriental Acupressure, and was on the telephone with Wilson, or visiting him, only a small percentage of the time Wilson was on the premises. Diane did not enter the business during half of her visits, and had never been inside the treatment rooms. She had also never entered the kitchen, where most if not all Wilson's conversations with the prostitutes occurred. The People did not present evidence that Wilson discussed sexual matters with customers or when making appointments; to the contrary, the evidence showed that in general, he simply asked how long the customer wished to stay, took the money, and showed customers to the rooms. In short, it was unlikely Diane was ever in a position where she would have been expected to overhear Wilsons discussing the prostitutes' services. Evidence that the true nature of the business was not revealed to her, during her phone calls and visits, was unsurprising and would have done little or nothing to assist the defense case.

On the other hand, as we have explained, the People's evidence was overwhelming. As detailed in our discussion of the sufficiency of the evidence *ante,* there was ample evidence that Wilson knew Oriental Acupressure was in the business of prostitution, including his videotaped conversations with employees, the fact he walked in on a customer and prostitute engaged in intercourse, Vanover's testimony, and the circumstantial evidence regarding the business's operation. Thus, even assuming the evidence should have been admitted, the error was harmless beyond a reasonable doubt.

3. *Sentence on the conspiracy charge must be stayed pursuant to section 654.*

a. *Additional facts.*

The trial court selected count 7, pimping in violation of section 266h, as the base term, and imposed the midterm sentence of four years. It imposed concurrent four-year sentences on the remaining two pimping counts (counts 9 & 13), the pandering counts (counts 8, 10, & 14), and the conspiracy count (count 1). Wilson asserts that because section 654 prohibits multiple punishment for both a conspiracy and the substantive offenses that were the object of the conspiracy, sentence on all counts other than count 1 must be stayed pursuant to section 654.

b. *Discussion.*

Section 654, subdivision (a), provides that an "act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." Section 654 precludes multiple punishment for a single act or a course of conduct comprising indivisible acts. (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143; *People v. Conners* (2008) 168 Cal.App.4th 443, 458; *People v. Moseley* (2008) 164 Cal.App.4th 1598, 1603.) " 'Whether a course of criminal conduct is divisible . . . depends on the intent and objective of the actor.' [Citations.] '[I]f all the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent' " and therefore may be punished only once. (*People v. Jones, supra*, at p. 1143; *People v. Latimer* (1993) 5 Cal.4th 1203, 1208.) If the defendant harbored multiple or simultaneous objectives, he or she may be punished for each violation committed in pursuit of each objective, even though the violations share common acts or were part of an otherwise indivisible course of conduct. (*People v. Jones, supra*, at p. 1143; *People v. Conners, supra*, at p. 458.)

It is settled that section 654 precludes punishment for both a conspiracy to commit a crime and the crime itself where the conspiracy and the substantive offense had the same objective. (*In re Cruz* (1966) 64 Cal.2d 178, 180-181; *People v. Lawley* (2002) 27 Cal.4th 102, 171 [defendant may not be punished for both murder and conspiracy to commit murder where murder was sole object of the conspiracy]; *People v. Briones* (2008) 167 Cal.App.4th 524, 529.) Separate punishment is permissible only when the conspiracy extends beyond the substantive offense. (*People v. Vargas* (2001) 91 Cal.App.4th 506, 571.) " '[P]unishment for both conspiracy and the underlying substantive offense has been held impermissible when the conspiracy contemplated only the act performed in the substantive offense [citations], or when the substantive offenses are the means by which the conspiracy is carried out [citation]. Punishment for both conspiracy and substantive offenses has been upheld when the conspiracy has broader or

different objectives from the specific substantive offenses. [Citations.] [Fn. omitted.]' " (*Id*. at p. 571.)

Applying these principles here, Wilson cannot be punished under section 654 for both conspiracy and the substantive offenses that were the objects of the conspiracy. There is no evidence that Wilson committed additional offenses beyond those contemplated by the conspiracy. The fact that prostitution occurred over a course of years at Oriental Acupressure establishes a course of continuing conduct with a single objective, not a broader or different objective than that charged in the conspiracy count. (Cf. *People v. Vargas, supra,* 91 Cal.App.4th at p. 571 [where defendant intended to kill persons in addition to those who were the subject of a conspiracy, section 654 did not preclude separate punishment]; *People v. Collins* (1966) 242 Cal.App.2d 626 [separate punishments for conspiracy to commit theft and theft upheld where the conspiracy's objectives went beyond the thefts of which the defendant was convicted].) The People cite no authority in which a conspiracy was found to have objectives that were broader or different from the specific substantive offenses under the circumstances presented here.

The remedy, however, is to stay the conspiracy count, not the remaining six counts as Wilson suggests. (See *People v. Briones*, *supra*, 167 Cal.App.4th at p. 530.) Accordingly, we order sentence on the conspiracy count stayed.

4. *Wilson's prison sentence does not amount to cruel or unusual punishment.*

Sections 266h and 266i, pimping and pandering respectively, set forth the punishment for those crimes as three, four, or six years in prison. (§§ 266h, subd. (a), 266i, subd. (a).) Under section 1203.065, subdivision (a), a person convicted of pimping or pandering is statutorily ineligible for probation.[14] Wilson contends the denial of probation and imposition of a four-year prison term constituted cruel and unusual punishment. We disagree.

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[14] Section 1203.065 provides, in pertinent part: "(a) Notwithstanding any other provision of law, probation shall not be granted to, nor shall the execution or imposition of sentence be suspended for, any person who is convicted of violating . . . Section[s] . . . 266h, 266i . . . ."

Preliminarily, the People correctly point out that Wilson's cruel and unusual punishment claim has been waived because he failed to object on this basis below. (*People v. Pecci* (1999) 72 Cal.App.4th 1500, 1503.)

In any event, the claim fails on the merits. It is settled that section 1203.065's prohibition on probation, and the prison terms set forth in sections 266h and 266i, do not constitute cruel or unusual punishment in the abstract. (See *People v. Gibson* (2001) 90 Cal.App.4th 371, 387; *People v. McNulty, supra,* 202 Cal.App.3d at pp. 631-635; *People v. Jeffers* (1987) 188 Cal.App.3d 840, 855; *People v. O'Connor* (1986) 188 Cal.App.3d 645, 647-650; *People v. Almodovar, supra,* 190 Cal.App.3d at p. 746.) Section 1203.065 is not facially unconstitutional.

Nor is the statute cruel or unusual as applied to Wilson. Wilson's four-year prison term does not run afoul of either the state or federal constitutions. Whether a punishment is cruel or unusual is a question of law, but we review the underlying facts in the light most favorable to the judgment. (*People v. Mantanez* (2002) 98 Cal.App.4th 354, 358.)

A punishment for a term of years violates the Eighth Amendment to the United States Constitution if it is an " 'extreme sentence[]' " that is " ' "grossly disproportionate" to the crime.' [Citation.]" (*Ewing v. California* (2003) 538 U.S. 11, 23 (plur. opn. of O'Connor, J.); *Lockyer v. Andrade* (2003) 538 U.S. 63, 72; *Harmelin v. Michigan* (1991) 501 U.S. 957, 1001.) In a noncapital case, " 'successful challenges to the proportionality of particular sentences have been exceedingly rare.' [Citation.]" (*Ewing v. California, supra,* at p. 21; *Lockyer v. Andrade, supra,* at p. 73.) The Eighth Amendment contains a " 'narrow proportionality principle' " applicable to noncapital sentences. (*Ewing v. California, supra,* at p. 20.) However, the Eighth Amendment does not require strict proportionality between crime and sentence, but only forbids extreme sentences that are grossly disproportionate to the crime. (*Id.* at p. 23.) For example, in *Andrade,* the defendant's two consecutive 25-years-to-life sentences, imposed for shoplifting videotapes valued at approximately $150, were upheld against an Eighth Amendment challenge. (*Lockyer v. Andrade, supra,* at p. 77.)

The instant matter does not present that " 'rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.' " (*Ewing v. California, supra,* 538 U.S. at p. 30.) Prostitution is a significant social evil, " 'immoral to an offensive degree, condemn[ing] women to a degrading existence which will make social derelicts of them within a relatively short period of time and is a major source of disease.' [Citation.]" (*People v. Almodovar, supra,* 190 Cal.App.3d at pp. 743-744.) Wilson facilitated hundreds of acts of prostitution during the many years he worked at Oriental Acupressure. We do not believe a four-year sentence amounts to cruel and unusual punishment given the morally repugnant nature of the crime.

A punishment violates the California Constitution if, "although not cruel or unusual in its method, it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424, fn. omitted.) In making this determination, we (1) examine the nature of the offense and the offender; (2) compare the punishment with that meted out for more serious crimes in California; and (3) compare the punishment with that given for the same offense in other jurisdictions. (*People v. Cooper* (1996) 43 Cal.App.4th 815, 825; *In re Lynch, supra,* at pp. 425-427; *People v. Martinez* (1999) 71 Cal.App.4th 1502, 1510.) Here, because Wilson does not address the second or third prongs of the *Lynch* analysis, we confine our discussion to the nature of the offense and the offender.[15]

The offenses of pimping and pandering are not trivial. As explained *ante*, prostitution is a significant social evil that degrades those involved in it. (*People v. Almodovar, supra,* 190 Cal.App.3d at pp. 743-744.) The "Legislature has reasonably determined pimping and pandering are dangerous to society. 'Pimping and pandering

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15 We observe that courts which have examined the issue have found no disproportionality when examining the second and third *Lynch* prongs. (See, e.g., *People v. Gibson, supra,* 90 Cal.App.4th at pp. 387-388; *People v. McNulty, supra,* 202 Cal.App.3d at pp. 633-634; *People v. O'Connor, supra,* 188 Cal.App.3d at p. 649; *People v. Jeffers, supra,* 188 Cal.App.3d at pp. 856-858.)

involve the corruption of others. The perpetrator of these offenses encourages, or profits from, the commission of crimes by others. The offenses evidence a "readiness to do evil" [citation] and are "extremely repugnant to accepted moral standards." . . .' [Citation.]" (*People v. Jeffers, supra,* 188 Cal.App.3d at p. 856.) Commercialized sexual activity adversely affects the community. (*Ibid.*)

Wilson engaged in the behavior for personal gain. He was 42 years old at the time of trial, and his age therefore does not factor in his favor. Unlike the defendant in *People v. Dillon* (1983) 34 Cal.3d 441, Wilson was not an immature youth who acted without thinking. (See *People v. Almodavar, supra,* 190 Cal.App.3d at p. 747.) Wilson facilitated hundreds of acts of prostitution over a multi-year period. Oriental Acupressure was a sophisticated, high-volume house of prostitution, with illicit operations continuing for years and reaping financial rewards for its proprietors. Wilson was well aware of, and facilitated, the establishment's efforts to avoid police. Our review of the record suggests Wilson was not a naïve or unsophisticated worker, but instead played a crucial role in the establishment's success. Although he contends he was paid only a pittance for his services, we cannot be certain of this: Over $2 million in cash was found in boxes in the owners' residence, demonstrating that the majority of transactions were carried out using cash. It is therefore entirely possible Wilson received cash payments in addition to his more meager paychecks. Although Wilson was not the "mastermind" or owner of the business, his role in its operations cannot be minimized. He was responsible for setting up appointments when customers called, screening clients, sending them into the prostitutes' rooms, and taking their money. It is true that the evidence showed no use of violence by Wilson, no employment of underage girls, and no efforts by Wilson to induce women to become prostitutes. It is also true Wilson appears to have had no prior record. Nonetheless, while the punishment meted out to him is undoubtedly harsh, "particularly where, as here, the crime does not involve force or violence and falls at the lower end of the range of culpability, we cannot say it is so disproportionate to the crime that it 'shocks the conscience and offends fundamental notions of human dignity.' [Citation.]" (*People v. Almodovar, supra,* 190 Cal.App.3d at p. 746.)

5. *Ineffective assistance of counsel.*

a. *Additional facts.*

The probation officer's report stated that Wilson had been cooperative and was a suitable candidate for probation, but for section 1203.065's prohibition on probation for persons convicted of pimping or pandering.

At sentencing, defense counsel pointed out the probation officer's comments, but did not expressly argue that probation was required because a prison term would constitute cruel and unusual punishment. When discussing a potential sentence, the trial court stated, "the court's hands are tied in this case because this is a case where the statute does not allow probation. [¶] Under most circumstances, somebody who is the defendant's age, who has no prior criminal record ordinarily is considered for probation in a situation like this. But the case law and the statutes are clear in that regard. [¶] And frankly, I was mildly surprised that the prosecution was only seeking the imposition of the midterm because . . . if you look at all the counts of which the defendant stands convicted, his potential maximum sentence in this case is well in excess of ten years." The court then reiterated that Wilson was statutorily ineligible for probation, "and probation is therefore denied." It added: "Also, this is a case where the court would possibly not consider probation simply because of the number of counts and the time period over which the defendant was involved in these activities."

b. *Discussion.*

Wilson argues his counsel provided ineffective assistance by failing to argue to the trial court that a prison term constituted cruel and unusual punishment, and he therefore should have been placed on probation. Wilson argues that there is "an established body of published case law" challenging section 1203.065's prohibition on probation. He suggests that given the court's and probation officer's comments, the court would likely have granted probation had counsel so argued. We do not agree.

"A meritorious claim of constitutionally ineffective assistance must establish both: '(1) that counsel's representation fell below an objective standard of reasonableness; *and* (2) that there is a reasonable probability that, but for counsel's unprofessional errors, a

determination more favorable to defendant would have resulted. [Citations.] If the defendant makes an insufficient showing on either one of these components, the ineffective assistance claim fails.' " (*People v. Holt* (1997) 15 Cal.4th 619, 703; *Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Lopez* (2008) 42 Cal.4th 960, 966.) A reasonable probability is a probability sufficient to undermine confidence in the outcome. (*People v. Bolin, supra,* 18 Cal.4th at p. 333.)

Here, apart from the question of whether counsel's performance was competent, Wilson cannot establish prejudice. There is no reasonable probability Wilson would have been sentenced to probation had his counsel argued a prison term was cruel and unusual punishment. As noted *ante*, California courts have routinely found section 1203.065's prohibition on probation constitutional. (See, e.g., *People v. Gibson, supra,* 90 Cal.App.4th at pp. 387-388; *People v. McNulty, supra,* 202 Cal.App.3d at p. 635; *People v. Jeffers, supra,*188 Cal.App.3d at p. 858.) Wilson does not point us to authority holding that section 1203.065 may be routinely disregarded. Challenges to section 1203.065 as cruel and unusual punishment have, as discussed, been generally rejected. In *People v. Freeman* (1988) 46 Cal.3d 419, 423, fn. 3, the trial court found compliance with section 1203.065 would have resulted in imposition of a cruel and unusual sentence. *Freeman* did not reach the question, however, because it reversed the judgment on other grounds. (*Ibid.*) It is axiomatic that cases are not authority for propositions not considered. (*People v. Avila* (2006) 38 Cal.4th 491, 566.)

Additionally, the trial court expressed misgivings about imposing probation, had it been statutorily permissible, due to the length of time Wilson had been involved with Oriental Acupressure and the extent of his services for the establishment. Had the court been inclined toward a more lenient sentence, it could have imposed the lower term, rather than selecting the midterm as it did. There is no likelihood the court would have imposed a more favorable sentence had Wilson's counsel made suggested arguments.

6. *Review of in camera Pitchess examination.*

a. *Additional facts.*

Prior to trial, co-defendants Lee and Johnson apparently filed a motion for discovery of various peace officer personnel records pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531. At some subsequent point, the trial court apparently ordered names, addresses and telephone numbers of certain complainants disclosed to co-defendants. Neither the *Pitchess* motion, the trial court's ruling, the transcript of any hearing on the motion, or the sealed transcript of that in camera hearing have been included in the record on appeal.

On February 8, 2005, Wilson successfully moved for modification of the court's order to allow information obtained as a result of the *Pitchess* motion to be disclosed to his counsel.

Subsequently, co-defendants filed a supplemental *Pitchess* motion. As with the initial *Pitchess* motion, the supplemental motion has not been made a part of the record on appeal. According to arguments made in an opposition to the supplemental motion filed by the Los Angeles County Sheriff's Department, defendants' supplemental motion sought disclosure of the "actual statements of and information regarding the *Pitchess* witnesses." On April 1, 2005, the trial court found the declaration in support of the supplemental motion inadequate, but gave the moving parties leave to file an amended declaration. On April 8, 2005, a supplemental declaration was apparently filed. That document has not been made a part of the record on appeal. On April 22, 2005, the trial court conducted a hearing on the disclosures requested in the supplemental *Pitchess* motion. It concluded there was an "inadequate showing as to one officer" but an adequate showing had been made as to two others. On April 29, 2005, the trial court conduced an in camera review of the materials sought in the supplemental *Pitchess* motion, and ordered disclosure. The sealed transcript of that in camera hearing is a part of the record on appeal.

b. *Discussion.*

Wilson requests that we "conduct an independent review of the *Pitchess* hearing and records produced, if any, to determine whether error occurred." Wilson fails to specify *which* hearing he requests us to review. In any event, he has forfeited the issue by failing to designate an adequate record on appeal. (See *People v. Barton* (1978) 21 Cal.3d 513, 519-520 [appellant's duty to provide record adequate for review].) Before an appellate court can knowledgeably rule upon an issue presented, we must have an adequate record. (Cf. *People v. Foss* (2007) 155 Cal.App.4th 113, 127; see 5 Cal.Jur.3d (2007) Appellate Review, § 487 ["The appellant's failure to provide an adequate record concerning an issue challenged on appeal requires that the issue be resolved against the appellant"].) Here, without either the original *Pitchess* motion, the trial court's ruling on that motion, or the supplemental motion and related declarations, we cannot determine which types of alleged misconduct the trial court found relevant, or for which officers, nor can we discern the basis for the court's conclusions. Likewise, without the supplemental motion and related declarations, we cannot discern what materials were the subject of that motion, or whether disclosure was appropriate. All that we can determine, after reviewing the sealed transcript of the April 29, 2005 in camera hearing, is that the trial court did not decline to disclose any proffered information to the defense.

DISPOSITION

The judgment is modified to reflect that Wilson's sentence on count 1, conspiracy, is stayed pursuant to Penal Code section 654. The clerk of the superior court is directed to prepare a corrected abstract of judgment and forward it to the Department of Corrections. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

KLEIN, P. J.

KITCHING, J.